A

**ISMAIL MOHAMAD**

**v.**

**WAN KHAIRANI WAN MAHMOOD & ANOTHER APPEAL**

B

FEDERAL COURT, PUTRAJAYA
ZAKI TUN AZMI CJ
ALAUDDIN MOHD SHERIFF PCA
HASHIM YUSOFF FCJ
C MOHD GHAZALI YUSOFF FCJ
TENGKU BAHARUDIN SHAH JCA
[CIVIL APPEALS NOS: 02(i)-44-2008 (W) &
02(i)-45-2008 (W)]
9 JUNE 2009

D

***FAMILY LAW:*** *Divorce - Muslim marriage - Distribution of assets - Injunctions - Harta sepencarian - Interest of company - Jurisdiction of Syariah Court and civil court - Overlapping jurisdiction - Duplicity of proceedings - Abuse of process - Derivative action - Minority shareholder*

E

***ISLAMIC LAW:*** *Divorce - Distribution of assets - Injunctions - Harta sepencarian - Interest of company - Jurisdiction of Syariah Court and civil court - Overlapping jurisdiction - Duplicity of proceedings - Abuse of process - Derivative action - Minority shareholder*

F

***CIVIL PROCEDURE:*** *Jurisdiction - Injunctions - Distribution of assets of divorced Muslim couple - Harta sepencarian - Interest of company - Jurisdiction of Syariah Court and civil court - Overlapping jurisdiction - Duplicity of proceedings - Abuse of process - Derivative action - Minority shareholder*

G

***CONSTITUTIONAL LAW:*** *Courts - Jurisdiction - Distribution of assets of divorced Muslim couple - Injunctions - Harta sepencarian - Interest of company - Jurisdiction of Syariah Court and civil court - Overlapping jurisdiction - Duplicity of proceedings - Abuse of process -*
H *Derivative action - Minority shareholder*

***COMPANY LAW:*** *Derivative action - Bringing action on behalf of company - Distribution of assets of divorced Muslim couple - Injunctions - Harta sepencarian - Interest of company - Jurisdiction of Syariah Court*
I *and civil court - Overlapping jurisdiction - Duplicity of proceedings - Abuse of process - Minority shareholder*

This case involved a dispute between a divorced Muslim couple as to the distribution of their assets upon their divorce. The husband and wife were shareholders in a company that, during the marriage, purchased many pieces of land; the wife was the minority shareholder, holding 7.97% of the shares in the company. The government acquired two lots of the lands and the proceeds of the compensation to the acquisition were, at the request of the husband (the director of the company), paid to him in person. The monies were held in his personal account in trust for the company. The wife subsequently obtained an injunction at the Syariah Court against the husband to protect her claim for harta sepencarian. At the same time she, acting on a derivative action on behalf of the company, sought an injunction to protect the company's interest. In the present appeals, the wife appealed against the Court of Appeal granting only a partial injunction in respect of her share of the compensation monies and the husband against the injunction being granted at all. The following questions required determination: (i) Where the Syariah Court is determining the status of certain lands for a harta sepencarian claim ('Syariah Action') by the plaintiff, whether the civil court could, on the basis of exercising overlapping jurisdiction, acquire jurisdiction to determine the status of the same lands in an action brought by the same plaintiff ('Civil Action'); (ii) when put on notice to discontinue the Syariah Action in view of the Civil Action, the plaintiff nevertheless actively pursued the Syariah Action by amending the claim and applying from injunction orders thereunder, whether it should be regarded that the plaintiff has elected to pursue the Syariah Action in place of the Civil Action; (iii) whether it is an abuse of process for the plaintiff to simultaneously maintain two actions over the same lands in two different courts wherein the claims and the causes of action in respect of the lands are inconsistent with each other; (iv) whether the bringing of proceedings both in the civil court as well as in the Syariah Court amounts to duplicity of proceedings and therefore is an abuse of the court's process; and (v) in a derivative action for recovery of company assets allegedly misappropriated by the majority shareholder, whether the court can divide the said assets according to the equity ratio of the shareholders and preserve by interim injunction only that part of the assets representing the equity ratio of the shareholder bringing the derivative action.

A **Held (dismissing the husband's appeal; allowing the wife's appeal)**
**Per Zaki Tun Azmi CJ delivering the judgment of the court:**

**(1)** Any jurisdiction that is lawfully vested in the Syariah Court is
B exclusively within the jurisdiction of the Syariah Court and the civil court cannot overstep its jurisdiction to decide on matters that strictly fall within the Syariah Court jurisdiction. But in this case that was not so. The wife was seeking to exercise her right as a minority shareholder and not as a wife. Her
C motive may be to protect her rights as a wife but that was irrelevant; her application must be viewed as one by a shareholder. There was a fallacy in the Court of Appeal judgment that there was an overlapping jurisdiction or "assisting jurisdiction". There cannot be an overlapping
D jurisdiction between the civil court and the Syariah Court, and neither could there be double proceedings as submitted by the husband. On the facts of this case, the action in the Syariah Court and the derivative action in the High Court were two separate independent actions although the results may seem to
E overlap. Therefore, questions (i), (ii), (iii) and (iv) were answered in the negative because there was no overlapping jurisdiction resulting in no question of the party having to elect the same and, hence, there was no abuse of process of the court. (paras 18 & 19)

F **(2)** A derivative action is one taken by a shareholder to protect his or her interest in the company. Since the action cannot be taken as a shareholder, he/she has to name the company as a party. The wife was thus protecting her interest in the
G company as a shareholder and not as a wife. Should she be successful at the Syariah Court to more than the value proportionate to her registered number of shares in the company, then the monies held by her husband as trustee for the company can be paid to her. In a divorced wife's claim
H for harta sepencarian, at the end of the day, she may be entitled to more than just her registered portion in the company. Therefore, if this court were to limit the injunction to only 7.97% of the monies held in the husband's name, in effect this court would already be deciding that the wife was
I only entitled to that portion of the monies. This court had no such jurisdiction. As to her rights in the Syariah Court, it was

left to the relevant forum to decide. The fact remained that the husband held the lands in trust for the beneficiary and the derivative action was an action for the benefit of the company. Therefore, with regard to question (v), the injunction was granted to prevent the husband from dissipating all the monies held by him in trust for the company. (paras 21, 22 & 23)

***Bahasa Malaysia*** *Translation Of Headnotes*

Kes ini melibatkan suatu pertikaian di antara satu pasangan suami isteri beragama Muslim yang telah bercerai berkenaan dengan pengagihan aset-aset mereka akibat penceraian mereka. Suami dan isteri merupakan pemegang-pemegang syer dalam sebuah syarikat yang, semasa perkahwinan mereka, membeli beberapa bidang tanah; isteri merupakan pemegang syer minoriti, dengan memegang 7.97% syer-syer dalam syarikat. Kerajaan telah memperolehi dua lot tanah tersebut dan hasil pampasan kepada perolehan itu telah, atas permintaan suami (pengarah syarikat itu), dibayar kepadanya sendiri. Wang itu dipegang sebagai amanah dalam akaun persendiriannya untuk syarikat. Isteri kemudiannya memperolehi suatu injunksi di Mahkamah Syariah terhadap suami untuk melindungi tuntutannya untuk harta sepencarian. Pada masa yang sama beliau, dalam suatu tindakan terbitan bagi pihak syarikat, menuntut sesuatu injunksi untuk melindungi kepentingan syarikat. Dalam rayuan-rayuan semasa, isteri telah merayu terhadap Mahkamah Rayuan hanya membenarkan suatu injunksi separa berhubungan dengan bahagian pampasan wangnya dan suami terhadap injunksi dibenarkan sama sekali. Soalan-soalan berikut perlu dipertimbangkan: (i) Di mana Mahkamah Syariah menentukan status tanah-tanah tertentu bagi suatu tuntutan harta sepencarian ('Tindakan Syariah') oleh plaintif, sama ada mahkamah sivil boleh, atas dasar melaksanakan bidang kuasa bertindih, memperolehi bidang kuasa untuk menentukan status tanah-tanah yang sama dalam suatu tindakan yang dikemukakan oleh plaintif yang sama ('Tindakan Sivil'); (ii) apabila diberi notis untuk menghentikan Tindakan Syariah memandangkan Tindakan Sivil itu, plaintif meskipun begitu melanjutkan secara aktif Tindakan Syariah dengan meminda tuntutan dan memohon dari perintah-perintah injunksi di bawahnya, sama ada ia sepatutnya dianggap bahawa plaintif telah memilih untuk melanjutkan Tindakan Syariah sebagai ganti kepada Tindakan Sivil; (iii) sama ada ia suatu penyalahgunaan proses bagi plaintif untuk mengekalkan dua tindakan pada masa yang sama atas

A tanah-tanah yang sama dalam dua mahkamah lain di mana tuntutan dan kausa tindakan mengenai tanah-tanah itu tidak konsisten sama sekali; (iv) sama ada pembawaan prosiding dalam kedua-dua mahkamah sivil dan juga Mahkamah Syariah bermaksud kependuaan prosiding dan oleh itu ialah suatu penyalahgunaan
B proses mahkamah; dan (v) dalam satu tindakan terbitan untuk mendapat kembali aset-aset syarikat yang dikatakan telah dilesapkan oleh pemegang syer majoriti, sama ada mahkamah boleh membahagi aset-aset itu mengikut ratio ekuiti pemegang-pemegang syer dan untuk mengekalkan melalui injunksi interim hanya
C bahagian aset itu yang mewakili ratio ekuiti pemegang syer yang membawa tindakan terbitan itu.

**Diputuskan (menolak rayuan suami; membenarkan rayuan isteri)**

D **Oleh Zaki Tun Azmi KHN menyampaikan penghakiman mahkamah:**

**(1)** Apa-apa bidang kuasa yang terletakhak dengan sah dalam Mahkamah Syariah termasuk dengan eksklusif dalam bidang
E kuasa Mahkamah Syariah dan mahkamah sivil tidak boleh melampaui bidang kuasanya untuk menentukan perkara-perkara yang terangkum dengan ketat dalam bidang kuasa Mahkamah Syariah. Tetapi dalam kes ini bukan begitu. Isteri cuba melaksanakan haknya sebagai pemegang syer minoriti dan
F bukan sebagai seorang isteri. Motifnya mungkin untuk melindungi haknya sebagai seorang isteri tetapi itu tidak relevan; permohonannya mesti dipandang seperti suatu yang dibuat oleh seorang pemegang syer. Terdapat suatu falasi dalam penghakiman Mahkamah Rayuan bahawa ada suatu
G bidang kuasa bertindih atau "bidang kuasa menolong". Tidak boleh ada suatu bidang kuasa bertindih di antara mahkamah sivil dan Mahkamah Syariah, dan juga tidak boleh ada prosiding kembar seperti yang dihujahkan oleh suami. Atas fakta kes ini, tindakan dalam Mahkamah Syariah dan tindakan
H terbitan dalam Mahkamah Tinggi merupakan dua tindakan berbeza yang lain walaupun keputusannya mungkin bertindih. Oleh itu, soalan-soalan (i), (ii), (iii) dan (iv) dijawab secara negatif kerana tidak terdapat bidang kuasa bertindih mengakibatkan tiada persoalanan tentang pihak terpaksa
I memilih yang sama dan, oleh itu, tidak ada penyalahgunaan proses mahkamah.

**(2)** Sesuatu tindakan terbitan ialah tindakan yang diambil oleh seseorang pemegang syer untuk melindungi kepentingannya dalam sebuah syarikat. Oleh kerana tindakan tidak boleh diambil sebagai pemegang syer, beliau perlu menamakan syarikat sebagai satu pihak. Isteri oleh itu melindungi kepentingannya dalam syarikat sebagai seorang pemegang syer dan bukan sebagai seorang isteri. Jikalau beliau berjaya di Mahkamah Syariah untuk mendapat lebih dari nilai yang bersekadar dengan nombor syer berdaftar beliau dalam syarikat, wang yang dipegang oleh suaminya sebagai pemegang amanah syarikat itu boleh dibayar kepadanya. Dalam suatu tuntutan harta sepencarian oleh isteri yang bercerai, pada kesudahannya, beliau mungkin berhak untuk mendapat lebih dari bahagian berdaftarnya dalam syarikat. Oleh itu, jika mahkamah ini menghadkan injunksi kepada hanya 7.97% jumlah wang yang dipegang atas nama suami, mahkamah ini sebenarnya akan menentukan bahawa isteri hanya berhak untuk mendapat bahagian itu wang itu. Mahkamah ini tidak mempunyai bidang kuasa sebegitu. Berkenaan dengan hak-haknya di Mahkamah Syariah, ia adalah untuk forum yang relevan untuk menentukan. Fakta sebenarnya ialah bahawa suami memegang tanah-tanah tersebut sebagai amanah untuk benefisiari dan tindakan terbitan itu merupakan sesuatu tindakan bagi faedah syarikat. Oleh itu, berhubungan dengan soalan (v), injunksi itu dibenarkan untuk menghalang suami dari melesapkan semua wang yang dipegang olehnya sebagai amanah untuk syarikat.

**Case(s) referred to:**

*Foss v. Harbottle [1843] 2 Hare 461* ***(refd)***

*Wan Khairani Wan Mahmood v. Ismail Mohamad & Anor [2007] 6 CLJ 582 CA* ***(refd)***

**Legislation referred to:**

Federal Constitution, art. 121(1A)

*(Civil Appeal No: 02(i)-44-2008 (W))*

*For the appellant - Dato' Dr Cyrus Das (Abdul Rashid Ismail, Megat Abdul Munir, Alan Wong & Andrew Heng with him); M/s Khalek Awang*

*For the respondent - Tuan Hj Sulaiman Abdullah (PY Chong with him); M/s Nordin Torji & Partners*

*(Civil Appeal No: 02(i)-45-2008 (W))*

*For the appellant - Tuan Hj Sulaiman Abdullah (PY Chong with him); M/s Nordin Torji & Partners*

*For the respondent - Dato' Dr Cyrus Das (Abdul Rashid Ismail, Megat Abdul Munir, Alan Wong & Andrew Heng with him); M/s Khalek Awang*

*Reported by Suresh Nathan*

## JUDGMENT

**Zaki Tun Azmi CJ:**

**[1]** This case involves a dispute between a divorced Muslim couple as to the distribution of their assets on their divorce. They applied for leave to appeal to this court, pertaining to the order of the Court of Appeal granting the injunction to prevent the husband[1] from dissipating the monies held by him which is equivalent to the wife's[2] share in the company.[3] She holds 7.97% of shares in the company.

**[2]** On 16 February 2009 this court heard the appeals from both parties against that decision; the wife against granting partial injunction and the husband against the Court of Appeal granting the injunction at all.

**[3]** Due to the urgency of the matter, we delivered our decision on 24 February 2009, dismissing appeal no. 02(i)-44-2008(W) and allowing appeal no. 02(i)-45-2008(W). In other words, injunction was granted to the wife restraining the husband from utilising 100% of the monies held by him in trust for the company. We now give our reasons.

**[4]** To protect her interest, the wife had obtained an injunction at the Syariah Court in 1992. The injunctive relief from the Syariah Court was against the husband to protect her claim for harta sepencarian.

**[5]** The background of the dispute is that the company of which the husband and the wife were shareholders, had during the marriage purchased many pieces of lands. As mentioned earlier, the wife is a minority shareholder. Two lots of these lands were acquired by the government.

**[6]** The proceeds of the compensation to the acquisition were at the request of the husband, as director of the company, paid to him in person. The monies are now held in his personal account in trust for the company. This is admitted by the husband.

**[7]** The wife contended that since the lands were acquired during their marriage, she is claiming 50% of it as harta sepencarian in the Syariah Court. Her likelihood of success in that court is not our concern at this juncture. The question which we have answered is whether the husband should be prevented from disposing any part of the proceeds.

**[8]** More detailed facts of this case can be found in the grounds of judgment of the Court of Appeal in *Wan Khairani Wan Mahmood v. Ismail Mohamad & Anor*.[4]

**[9]** The wife at the same time, acting on derivative action on behalf of a company, sought an injunction to protect the company's interest. What is a derivative action is quite well settled but will be briefly explained later in this judgment.

**[10]** The injunction at the Syariah Court on the other hand is to prevent the husband from dissipating the assets acquired during the marriage before the Syariah Court makes a decision on their distribution. The injunction at the civil court is to await the decision of the High Court on the declaration that the land (and now the compensation monies paid as a result of acquisition of the lands allegedly belonging to the company) belongs to the company.

**[11]** However, the Court of Appeal in granting injunction only in respect of the wife's share of the compensation money decided that there was overlapping jurisdiction of the Syariah Court and the civil court. According to the Court of Appeal, it has to be either within the Syariah Court or within the civil court. Here, there are two separate parties, one, the Wife and the other the company to which the wife is a shareholder.

**[12]** It is important to note that at the application for leave to this appeal, both parties agreed or consented that the following questions mentioned below be referred to this court. There was no argument heard as to whether leave should be allowed or not. I was a member of the panel that granted leave. The agreed questions were:

A a. Where the Syariah Court is determining the status of certain lands for a harta sepencarian claim ("the Syariah Action") by the plaintiff, whether the civil court could, on the basis of exercising overlapping jurisdiction, acquire jurisdiction to determine the status of the same lands in an action brought
B by the same plaintiff ("the Civil Action").

b. Whether when put on notice to discontinue the Syariah Action in view of the Civil Action, nevertheless the plaintiff actively pursued the Syariah Action by amending the claim and
C applying from injunction orders thereunder, it should be regarded that the plaintiff has elected thereby to pursue the Syariah Action in place of the Civil Action?

c. Whether it is an abuse of process for the plaintiff to simultaneously maintain two actions over the same lands in
D two different courts wherein the claims and the causes of action in respect of the lands are inconsistent with each other?

d. Whether the bringing of proceedings both in the Civil Court as well in the Syariah Court amounts to duplicity of
E proceedings and therefore is an abuse of process of court.

e. In a derivative action for recovery of company assets allegedly misappropriated by the majority shareholder, can the court divide the said assets according to the equity ratio of the
F shareholders and preserve by interim injunction only that part of the assets representing the equity ratio of the shareholder bringing the derivative action?

**[13]** The husband's argument is that by virtue of art. 121(1A) of
G the Federal Constitution, the wife cannot apply for the injunction before a civil court because it involves the distribution of assets of a Muslim marriage which is within the jurisdiction of the Syariah Court. Alternatively, the wife must elect whether to proceed in the Syariah Court or the civil courts. She cannot apply for
H injunctions in both courts.

**[14]** According to the husband, since there are only two shareholders in the company, whatever the wife does on behalf of the company is in fact to protect her personal interest.

I

**[15]** The wife's reply is simple. She says that in the Syariah Court, she is applying as the wife but in the civil court, she is applying as a minority shareholder in or as representative of the company. In other words, it is the company which is applying for the declaration. She is merely acting on behalf of the company to protect the company's assets. Therefore, the question of conflict of or overlapping jurisdiction does not arise.

**[16]** The husband's argument is that since the wife had obtained an injunction at the Syariah Court against 100% of the assets including the proceeds of the sale of the two subject lands, the wife cannot at the same time obtain another injunction in the civil courts in respect of the same amount. According to his counsel, this would be in breach of art. 121(1A). He cited several authorities to say that the jurisdiction or orders made by the Syariah Court is exclusive. He says that once the matter falls within the Syariah jurisdiction, she cannot at the same time, simultaneously obtain a similar order from the civil courts.

**[17]** I would agree to this submission had both the injunctions been obtained by the wife in her personal capacity. Instead, we find as a matter of fact that the injunction in the civil court was sought by the company. If that is so, on the facts and issues in this appeal, those authorities cited by the husband cannot be relevant to this appeal. As to the argument that the final beneficiary to both injunctions is in fact the wife, we do not think this matters.

**[18]** It is not denied that any jurisdiction that is lawfully vested in the Syariah Court is exclusively within the jurisdiction of the Syariah Court. It is also admitted that the civil court cannot overstep its jurisdiction to decide on matters which strictly fall within the Syariah Court jurisdiction.[5] But in this case that is not so. The wife is seeking to exercise her right as a minority shareholder and not as a wife. Her motive may be to protect her rights as a wife but that is irrelevant. One must view her application as one by a shareholder. It does not prevent her from doing so. It is not denied that if she had not filed an action to claim *harta sepencarian* in the Syariah Court, the objection to her filing the derivative action may not arise.

**[19]** In my opinion, there is a fallacy in the Court of Appeal judgment that there is an overlapping jurisdiction or "assisting jurisdiction". There cannot be an overlapping jurisdiction between the civil court and the Syariah Court. Neither can there be double proceedings as submitted by the husband. On the facts of this case, the action in the Syariah Court and the derivative action in the High Court are two separate independent actions although the results may seem to overlap. Therefore questions (a), (b), (c) and (d) of para 12 above are answered in the negative because there is no overlapping jurisdiction resulting in no question of the party having to elect the same and therefore there was no abuse of process of the court.

**[20]** In my opinion, a derivative action is a derivative action. The number of shareholders is not material, whether there are two or more. A minority shareholder has the right to take a derivative action to protect the interests of a company.

**[21]** In a derivative action, the action is brought for and on behalf of the company for the company's benefit. Derivative action is one taken by a shareholder to protect his or her interest in the company. Since the action cannot be taken by a shareholder (by virtue of *Foss v. Harbottle*[6]) he/she has to name the company as a party. The wife is therefore protecting her interest in the company as a shareholder and not as a wife.

**[22]** Should she be successful at the Syariah Court to more than the value proportionate to her registered number of shares in the company, then the monies now held by her husband as trustee for the company can be paid to her. In a divorced wife's claim for harta sepencarian, at the end of the day, she may be entitled to more than just her registered portion in the company. Therefore, if we are to limit the injunction to only 7.97% of the monies now held in the name of the husband, in effect this court would already be deciding that the wife is only entitled to that portion of the monies. This court has no such jurisdiction. As to her rights in the Syariah court, I would not like to make any comments. It is left to the relevant forum to decide.

**[23]** The facts remain that the husband held the lands in trust for the beneficiary (ie, the company by virtue of an express trust deed dated 21 January 1986) and the derivative action is an action for the benefit of the company. Therefore, with regard to

question (e) of para 12 above, the injunction is granted to prevent the husband from dissipating all the monies held by the husband in trust for the company.

**[24]** The order is therefore as mentioned in para 3 of these grounds of judgment.

**[25]** My learned brother judges Alauddin Dato' Mohd Sheriff PCA, Hashim Dato' Hj. Yusoff FCJ, Mohd. Ghazali Mohd. Yusoff FCJ and Tengku Baharudin Shah Tengku Mahmud JCA have read through this judgment in draft and concurred with it.

**Endnotes:**

1. The appellant in Rayuan Sivil No. 02(i)-44-2008(W) and first respondent in Rayuan Sivil No. 02(i)-45-2008(W).
2. The respondent in Rayuan Sivil No. 02(i)-44-2008(W) and appellant in Rayuan Sivil No. 02(i)-45-2008(W).
3. The second respondent in Rayuan Sivil No. 02(i)-45-2008(W).
4. [2007] 6 CLJ 582.
5. See *Mohamed Habibullah bin Mahmood v. Faridah bte Dato Talib* [1993] 1 CLJ 264 and *Salijah bte Ab Latef v. Mohd Irwan bin Abdullah Teo* [1996] 2 SLR 201
6. [1843] 2 Hare 461.